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Der Blog des Arbeitskreises junger Völkerrechtswissenschaftler*innen

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DEBATING "BEYOND HUMAN RIGHTS" SYMPOSIUM

Beyond Human Rights – Beyond International Law?

ROLAND PORTMANN — 20 January, 2016



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There is much to admire in Anne Peters' book, so much that after reading *Jenseits der Menschenrechte*, it is difficult to imagine what else can be done in this area of the law. Peters' book represents the standard treatise in the field for the time being, ably demonstrating chapter by chapter that the

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individual enjoys direct legal status in international law way beyond human rights.

The next task: go beyond international law

Peters having set the record straight on the individual's role in international law beyond human rights, the focus of future scholarship, in my view, should cover topics that go beyond international law as it has been traditionally understood. I see mainly two peripheral areas of international law that Peters – in her comprehensive treatment of the topic – sure enough touches upon, but does not deal with in definite terms: (1) the national legal principles determining the effect of international law in domestic legal systems; and (2) international standards not amounting to international law properly so-called. These two areas, in my view, deserve more attention in future scholarship dealing with individuals or other non-state entities in the international legal system.

Domestic law on incorporation of international treaties

Peters certainly underlines the importance of domestic laws implementing international legal obligations (§16). However, this seems to be one of the areas in which further research is promising or even necessary. For as long as most international legal rights of individuals are enforced through national courts, domestic law concepts at the intersection of legal orders, like the time-honored concepts of dualism and monism or the doctrine of direct effect (self-executingness) remain key issues. There is a tendency, certainly in the United States Supreme Court in the aftermath of Medellin, to accept self-execution of a specific treaty provision in only the most exceptional of cases, thereby off-setting the direct role individuals increasingly play as a matter of international

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law. As Peters shows, such domestic legal determinations, while being informed by Article 31 of the Vienna Convention on the Law of Treaties, mostly rely on national practices and principles. What is the point of departure of these principles and how have they developed over time? To what extent have they been informed by the exclusion of individuals in international law in older times? I strongly believe that it is worthwhile to more closely scrutinize these domestic practices and principles in order to gain a fuller picture of their legal merits under today's circumstances. We need more direct engagement with the interface of domestic constitutional law and international law in order to come to a more clear understanding of what role individuals actually play in today's international legal system.

Soft law standards

It is a truism that most of today's international law-making is not done via multilateral treaties, but via some form of soft law standards. Examples include international norms on financial regulation created by the Financial Stability Board or the principles on private military and security companies enunciated in the Montreux-Dokument. In this context of soft law standards, individuals and other non-state actors are, on the one hand, often much more part of the law creation-process and, on the other hand, of the personal scope of application. Indeed, in some areas of recent international standard-setting, as Peters points out in her book (§17), the enlargement of the role of individuals precisely is one of the reasons for their soft law nature. It seems to me that these tendencies and their repercussions for international law and the role of individuals therein deserve further research. Does it mean that individuals will have an even more forceful role in the international legal

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system? Or is it more of a threat for the role of individuals because there will be a distinction between the personal scope of soft law (large) and of hard law (still more restrained to states)? It is especially this interlinkage between the role of individuals in soft law and in hard law that, in my view, merits further research in order not only to gain a fuller picture of the individual's role in international regulatory affairs as a whole, but also in international law as it is traditionally understood.

The advantages and pitfalls of a broader view

Admittedly, the two areas where I see merit in further research often pose fundamental and difficult questions. And of course, they are not a part of international law properly so-called. I know from my own attempt at contributing something to our understanding of legal personality in international law that one cannot include too much. But now that Peters has so ably demonstrated the role of the individual in international law in general, a new focus on the interface with domestic constitutional law and international soft law may give us a more complete understanding on the individual's role in the international legal system.

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